No. 89-1322

In The
Supreme Court of the United States

October Term, 1989

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE OKLAHOMA TAX COMMISSION

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether an Indian tribe may operate a business, open to the general public, selling cigarettes and other items without complying with any applicable State tax law by virtue of the Sovereign Immunity Doctrine.

2. Whether the State may enforce compliance of State tax laws against a tribally-owned business by way of assessment for delinquent taxes against the Indian tribe or by a lawsuit to enjoin the tribal business activity until taxes are properly paid.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Oklahoma Tax Commission, and the respondent, Citizen Band Potawatomi Indian Tribe of Oklahoma. Cindy Rambo, Chairman of the Tax Commission; Robert L. Wadley, Vice-Chairman ofthe Tax Commission; and Don Kilpatrick, Secretary of the Tax Commission, were named in the proceedings below as defendants - appellees/cross appellants in their official capacities as members of the Oklahoma Tax Commission.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 888 F2d 1303, and is reprinted in the pet. cert. p. A-1.

The Judgment of the United States District court for the Western District of Oklahoma (West, DJ) has not been reported. It is reprinted in the pet. cert. p. A-9. The Order of the District Court is not reported and is reprinted at pet. cert. p. A-12.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l). The opinion of the Court of Appeals for the Tenth Circuit was entered on November 3, 1989. The Petition for Writ of Certiorari was docketed in this Court on January 29, 1990. The Petition was granted on October 1, 1990.

STATUTES INVOLVED

Title 28 United States Code §1254(l) is set forth in the pet. cert. p. A-26. The Federal jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Plaintiff below is a federally recognized Indian tribe. Title 28 U.S.C. §1362 is set forth in the pet. cert. p. A-25.

STATEMENT OF THE CASE

The Citizen Band Potawatomi Indian Tribe of Oklahoma (Tribe hereafter), a federally recognized Indian tribe, owns and operates a convenience store which is open to the general public and from which the Tribe sells large quantities of cigarettes and other convenience store items. The tribal store is located on a tract of land within Pottawatomie County in Shawnee, Oklahoma, which is held by the United States in trust for the Tribe. The Tribe had acquired the land, containing approximately 280 acres, from the United States in fee, unrestricted as to Indian ownership and taxable under the Act of September 13, 1960, 74 Stat. 903 and the Act of August 11, 1964, 78 Stat. 392. Subsequently, on May 27, 1976, the Tribe conveyed the land to "the United States of America in trust for the Citizen Band of Potawatomi Indians of Oklahoma" pursuant to the Act of January 2, 1975, 88 Stat. 1922.

The Tribe imposes its own cigarette tax by affixing its own tax stamp to the packages of cigarettes sold at the tribal store. The proceeds of the Tribe's cigarette tax and the profits generated by the tribal store finance tribal operations.

Oklahoma law requires all vendors of tangible personal property, including cigarettes, to collect and remit state and local sales taxes (4 3/4% State plus 2% or 3% local) to the Oklahoma Tax Commission (State hereafter), 68 O.S. §1361. In addition, cigarette excise taxes are imposed on the consumer of cigarettes at the rate of $2.30 per carton of 10 packages containing 20 cigarettes each, 68 O.S. §302, 302-1, 302-2, 302-3, 302-4. Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor from the State and affixed to each package of cigarettes sold. If a vendor sells cigarettes without affixing the excise tax stamp, the vendor will be liable to pay the State a sum equal to twice the amount of the tax due, 68 O.S. §305(c). If any vendor fails to comply with the State's Cigarette Stamp Tax Act or the Oklahoma Sales Tax Code, the Tax Commission shall determine the correct amount of tax due and issue an assessment for those taxes to the vendor by letter pursuant to 68 O.S. §221, and thereafter commence collection procedures. If a vendor continues to operate a business without paying the taxes imposed by State law, the State may institute any action necessary to enjoin such vendor from operating that business within Oklahoma, 68 O.S. §232.

The Tribe has sold and continues to sell, cigarettes and other taxable items from its place of business within the State of Oklahoma to the general public without regard as to whether its customers were tribal members or not. The Tribe does not collect the applicable State taxes on any of its sales and does not comply with the Cigarette Stamp Tax Act, 68 O.S.§ 301 *et seq.*, or the Oklahoma Sales Tax Code, 68 O.S. §1350 *et seq.*, in any respect. Based upon the Tribe's business activity, the State issued an assessment letter to the Tribe on March 4, 1987, in the amount of $2,691,470.70 for the sale and distribution of unstamped cigarettes, pet. cert. p. A-23.

After the State issued the assessment letter, the Tribe brought an action against the State in the United States District Court for the Western District of Oklahoma to enjoin the State from enforcing any State tax law against the tribal business and from assessing the Tribe for delinquent cigarette taxes, see complaint, op. cert. p. A-1. The jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the plaintiff is a federally recognized Indian tribe.

The State answered and brought a counterclaim, op. cert. p. B-1, pursuant to Rule 13(a) and Rule 18(a) of the Federal Rules of Civil Procedure seeking declaratory and injunctive relief, declaring that State tax laws do apply to the tribal business and may be enforced against the Tribe and enjoining the Tribe from operating its business until it fully complies with State tax laws. The Tribe moved to dismiss the State's counterclaim, which was denied by the District Court in its Order of May 29, 1987, op. cert. p. C-1.

The District Court entered its judgment, pet. cert. p. A-9, in this case on May 6, 1988, in accordance with its Order of April 15, 1988, pet. cert. p. A-12. The District Court found that it had jurisdiction of both the complaint and the counterclaim and ordered that the Tribe is immune from the application of State tax laws and therefore the State is enjoined from enforcing its tax laws against the Tribe, and from assessing the Tribe for delinquent taxes or collecting taxes from the Tribe. However, the District Court found that the land upon which the store was located was an Indian reservation under 18 U.S.C. §1151 and therefore, sales to tribal members were exempt from State taxation but sales to non-tribal members were subject to State taxes and the Tribe must aid the state in collecting these taxes under the authority of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). Both litigants appealed this decision.

On Appeal, the Tenth Circuit Opinion, pet. cert. p. A-1, first held that (1) the Tribe enjoyed sovereign immunity from unconsented suit, citing *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977); (2) Rule 13(a) of the Federal Rules of Civil Procedure did not waive the Tribe's immunity; and (3) the District Court lacked jurisdiction to adjudicate the counterclaim. The Court therefore reversed the trial court's denial of the Tribe's motion to dismiss the State's counterclaims and directed the lower court to dismiss all counterclaims against the Tribe.

The Appeals Court then found that the land where the tribal store is located was an Indian reservation and thus, "because the convenience store is located on land over which the Potawatomis

retained sovereign powers, Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." The Appeals Court found that no such jurisdiction exists and rejected the State's citation of authority to this Court's opinions in *Moe* and *Colville* for the State's proposition that the Tribe must collect the State's taxes. The Court ruled that the Tribe was not amenable to any State law under the doctrine of sovereign immunity and imposed a broad injunction upon the State from assessing or collecting taxes from the Tribe or enforcing any tax law against the Tribe and its business.

SUMMARY OF ARGUMENT

This case involves the State's attempt to apply taxes to sales transactions at the tribal store and enforcement of those taxes by two methods; 1. assessment of delinquent taxes pursuant to State law, 68 O.S. §221 and 2. a lawsuit (in this particular case a counterclaim to the Tribe's complaint) to enjoin the operation of the tribal store until the Tribe fully complies with State tax laws pursuant to 68 O.S. §232. This case also includes the Tribe's attempt to avoid the application or compliance to State laws by enjoining the State from any enforcement action. The Tenth Circuit ruling provides that the Tribe is unresponsible to State laws and is unanswerable in Court to the State's action because of tribal sovereign immunity. Under this doctrine alone, the Tenth Circuit has imposed a broad injunction on the State from ever enforcing its tax laws in any respect against the Tribal business.

The State's first argument proposes that State taxes are applicable to the Tribe's sales transactions under the controlling authority of this Court's decision in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) which was rejected by the Tenth Circuit. The State argues that the State taxation does not infringe on the right of reservation Indians to make their own laws and be ruled by them because there are no reservations in Oklahoma. The several cession agreements and the work of the Dawes Commission in the years prior to Statehood disestablished the reservation system in Oklahoma and Congress has since that time intended that no reservations be re-established. Therefore, the Tribes in

Oklahoma have not been set apart from the State on a federal reservation and do not maintain a separate and independent existence apart from the general community, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

The State concludes in its first argument, that there is no law or reason that would allow the Tribe to make untaxed goods available to the citizens of this State. Under the authority of *Colville*, the taxes are clearly applicable even on a reservation, and the case of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), holds that tribal activities conducted outside the reservation boundaries are subject to nondiscriminatory state law otherwise applicable to all citizens of the State. The Tenth Circuits opinion erroneously rejected the holding in these two cases in order to enjoin the application of state tax laws.

In the Second Argument, the State attacks the validity of the tribal sovereign immunity doctrine as a defense against the State action to assess or sue the Tribe in order to actually collect the tax revenue that the *Colville* case had presumably restored to the State. The State urges that the Tribe should not be allowed to infringe on the States rights to govern its internal affairs. The State points out that the taxes at issue are imposed on the customers of the store and do not tax the Tribe as a Tribe or regulate the internal affairs of tribal government. The Tenth Circuit's ruling enjoining the State from collecting its valid taxes impermissably burdens the administration of State tax laws in violation of the Tenth Amendment to the Constitution of the United States. Furthermore, the sovereignty doctrine is not useful in this day when the tribal activities are no longer restricted to the internal social relations of the Tribe as a separate people, but have increased in scope to include the community of the State at large. The Tribe is using the sovereignty doctrine of *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) in order to resurrect the intergovernmental immunity doctrine which was repudiated by *Mescalero* and a long list of other cases. There is no reason why the Tribe should not comply with State tax laws at its business, but there is no way the Tribe will comply with those laws as long as it can avoid any enforcement by way of Indian sovereignty. The sovereignty doctrine should be limited to the tribal courts and the internal affairs of tribal govern-

ment because of its encroachment upon the authority of the State to administer its laws.

ARGUMENT

I. STATE TAXES ARE APPLICABLE TO SALES OF CIGARETTES AND OTHER ITEMS AT THE TRIBAL STORE.

In 1976, this Court issued its opinion in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and held that Indian retailers on an Indian reservation must collect all state taxes applicable to sales to non-Indians;

> The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. . . We see nothing in this burden which frustrates tribal self-government. . .or runs afoul of any congressional enactment dealing with the affairs of reservation Indians. . . We therefore agree with the District court that to the extent that the "smokeshops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.

It appeared under the *Moe* decision that a straightforward and well-reasoned rule was developed with regard to tribally owned stores which sought to do business within the general community, and beyond the membership of the tribe, in that such businesses would be required to comply with State laws so that the tribal business could not be used as a means by non-Indians to evade their legal obligations. The Court realized that "Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked."

In 1980, this court again ruled that tribal sellers were obliged to collect and remit state taxes on sales to non-tribal members at Indian Smokeshops on reservation lands in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The obligation of State tax laws were applicable to tribal smokeshops on Indian reservations in these two cases because the State's taxation of non-tribal members did not infringe on the right of reservation Indians to make their own laws and be ruled by them.

After balancing the interests of the Tribe and the State in the *Colville* case, this Court concluded that Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to non-members who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations. By balancing the interests of the State and the Tribe in *Colville*, this Court declined to subject the analysis to a strict, mechanical application of tribal sovereignty, but instead found that the obligations imposed by the State laws did not infringe tribal rights to self-government because the principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State on the other. And neither did the State's tax laws run afoul of any federal law preempting the State's right to tax its own citizens. This Court stated, "It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes."

In the case at bar, the State is attempting to collect the taxes under the rationale of the *Moe and Colville* decisions that affirm the State's right to those tax revenues. However, the Tenth Circuit decision foreclosed the State's reliance on this Court's opinions by finding that those decisions are not applicable to Oklahoma because, since "the convenience store is located on land over which the Potawatomis retain sovereign powers, Oklahoma has no authority to tax the stores transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress," pet. cert. p. A-7. The Appeals Court found that the State's reliance on Colville was misplaced because the State of Washington had asserted jurisdiction over the tribes in *Colville* under Pub. L. No. 83-280, 67 Stat. 588, as opposed to this case where the lower court found that Oklahoma cites no federal law granting such jurisdiction, Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union, Oklahoma did not assert jurisdiction under Public Law 280, and the Tribe has not voluntarily submitted to jurisdiction. Therefore, the Appeals Court concluded that the State should be subjected to a broad injunction prohibiting the State from collecting sales taxes from the tribal store.

The Tenth Circuit also based its opinion on its finding that the tribal store was located on an Indian reservation as defined by 18 U.S.C. §1151(a). This finding was important to the opinion because the lower court could then dispense with this Court's authority in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), which concluded that Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory State law otherwise applicable to all citizens of the State.

The State first questions the Appeals Court's finding that the land in question, held in trust for the tribe, is an Indian reservation, which fact would preclude the State's reliance on *Mescalero*. The State next questions the Appeals Court's ruling that the State has no jurisdiction to apply its tax laws to transactions at the tribal store, which ruling precludes the States reliance on *Moe and Colville*.

A. The Indian Reservation system has been disestablished in Oklahoma.

The issue of whether or not the tribal store in this case is located on or off of a reservation is drawn from the distinction made in the treatment of the companion cases of *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *Mescalero*, the tribal business was held subject to State tax laws because it was operated off of the reservation, while the individual Navajo Indian in *McClanahan* was not subject to State income taxes because she lived and earned her income within the Navajo reservation in Arizona. In *McClanahan*,

this Court stated at 411 U.S. 171:

> "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." U.S. Dept. of the Interior, *Federal Indian Law* 845 (1958).

Although this passage only refers to Indians on a reservation as being exempt from State taxes, the Tenth Circuit has taken a broader view by ruling in this case that anyone who enters an Indian reservation to do business is exempt from State laws. The Tenth Circuit not only had to enlarge the rule in *McClanahan* in order to make this case fit in it, but the Appeals Court also had to disregard the last 100 years of history.

In *McClanahan*, this Court began its analysis with the treaty which the United States entered with the Navajo Nation in 1868 to provide a reservation for the use and occupation of the Navajo. Although the treaty nowhere states that the Navajo's would be exempt from State taxes, this Court interpreted the treaty to preclude extension of State law to the Indians because the treaty was intended by the Government to establish an exclusive federal reservation under general federal supervision.

The treatment of Indian tribes in the former Indian Territory, now Oklahoma, was much different than that of the Navajo experience. The Citizen Band Potawatomi Tribe was removed to a reservation in Indian Territory by the Treaty of February 27, 1867, 15 Stat. 531 where a reservation was established for the Tribe, see Order of District Court, pet. cert. p. A-13. This treaty clearly provided that such reservation shall never be included within the jurisdiction of any State, as was typical of all treaties creating tribal reservations in Indian Territory. However, during the ensuing years the reservation was allotted in severalty and, by the Act of March 3, 1891, 26 Stat. 1016, the Tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character" in the reservation. The Presidential Proclamation of September 18, 1891, 27 Stat. 989, opened the ceded lands to settlement.

The District Court found in its Order, pet cert. p. A-15, that the subject reservation had been disestablished by the Act of March 3, 1891, citing *DeCoteau v. District County Court*, 420 U.S. 425 (1975) where this Court addressed the sum certain cession agreements which pertain to this case and found that those reservations had been terminated, see footnotes 21 and 22 at 420 U.S. 439 referencing the Potawatomi agreement. It is unmistakable that Congress intended to dispose of these reservations from the tenor of the remarks of Congressman Perkins, 22 Cong. Rec. 3784 (1891) cited in *DeCoteau* at 420 U.S. 440;

> The bill carries the largest appropriation ever carried by an Indian appropriation bill, but it extinguishes the Indian title to a great domain and opens it to settlement by the hardy and progressive pioneers.

The subject tract of land in this case was thereafter held by the United States Government until it was conveyed to the Tribe by the Act of September 13, 1960, 74 Stat. 903, and the Act of August 11, 1964, 78 Stat. 392, which transferred title to the Tribe subject to no exemption from taxation or restriction on use, management or disposition because of Indian Ownership. The Congressional reports on these bills suggested conveying the land in unrestricted status in order relieve the Federal Government of responsibility for managing the land, see HR No. 1661, 86th Cong. 2d Sess., May 26, 1960; SR No. 1605, 86th Cong. 2d Sess., June 16, 1960; HR No. 1490, 88th Cong. 2d Sess., June 16, 1964. However, the land was later transferred in trust to the United States for the benefit of the Tribe by the Act of January 2, 1975, 88 Stat. 1922 in order to enable the Tribe to qualify for loans and grants from the Economic Development Administration, see SR No. 93-877, 93rd Cong. 2d Sess., May 23, 1974.

The District Court found that the transfer in trust indicated a renewed existence of federal superintendence such that this land is

an Indian reservation, pet. cert. p. A-17. The Tenth Circuit ruled that "lands held in trust by the United States for the Tribes are Indian Country within the meaning of 1151(a)." The Tenth Circuit based its finding on selected language from *United States v. John*, 437 U.S. 634 (1978) which refers to the test of determining Indian Country is whether the land has been set apart for the use of the Indians as such, under the superintendence of the Government. Besides quoting the text, the Tenth Circuit offers no statutory authority to uphold its finding in this case.

The State would submit that the Government did not intend to establish a reservation under the Act of January 2, 1975, because the transfer in trust was made to enable the tribe to qualify for loans to build a park and other public buildings and was not acquired for the purpose of providing land for the tribal members to live. A leading treatise on Indian law states that the modern meaning of an Indian Reservation refers to land set aside under federal protection for the residence of tribal Indians, Cohen, *Handbook of Federal Indian Law*, p. 34 (1982).

Further, the history of the creation of the State of Oklahoma suggests that the comprehensive plan of Congress at that time was manifested in Congress' intention to terminate federal supervision over Oklahoma Indians in *Williams v. Lee*, 358 U.S. 218 at 222 (1959), where the court found that, "Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. See HR Rep. No. 848, 83rd Cong. 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worchester v. State of Georgia*, [6 Pet. 515 (1832)], had denied." In Note 6 at 358 U.S. 221, the Court noted examples of express grants of state authority by Congress including 28 U.S.C. 1360 (P.L. 280) granting broad jurisdiction to California, Minnesota, Nebraska, Oregon, and Wisconsin. The Court also stated that the series of statutes granting extensive jurisdiction over Oklahoma Indians to state courts are discussed in

U.S. Department of Interior, *Federal Indian Law* at 985-1051 (1958).

The section on laws relating to Oklahoma in the Federal Indian Law treatise is a detailed commentary of the Federal Government's policy in Indian Territory which was centered to a great extent on the work of the Commission to the Five Civilized Tribes, more commonly called the "Dawes Commission." This treatise discusses the Government of Indian Territory at page 991 and relates that Non-Indians overflowed into the Indian Territory and reached about a quarter of a million at the beginning of 1890. Although white settlement was illegal, the federal government did nothing to stop it. Many of these people strongly desired to substitute their own methods of government for those of the tribes despite treaty obligations. This was due in part to a general absence of effective law enforcement and a demand by the non-Indians to abolish the reservations so that land could pass freely into their hands and the Territory could be politically reorganized into a state.

By 1890, when the Oklahoma Territory adjacent to the Indian Territory was opened and a territorial government created, the clamor for allotment had reached a new peak. All the federal agencies responsible for Indian Affairs were advising Congress of the need to change the current system. The leading congressional proponent of allotment and assimilation was Senator Henry L. Dawes of Massachusetts. At his insistence, the Congress in 1887 passed the Dawes Severalty Act (24 Stat. 388) providing for allotments on Indian reservations with the remaining unallotted lands on those reservations to be purchased by the government and thrown open to homesteading.

The case of *Woodward v. DeGraffenried*, 238 U.S. 284, (1915) details the efforts of Congress to organize the Territories for Statehood. At 238 U.S. 295, the Supreme Court found that under the Act of March 3, 1893, known as the Dawes Commission Act, 27 Stat. 612, it was the declared policy of the Congress to seek the allotment of all reservations in Indian Territory. To this end Congress, at 16 of this same Act, created the Dawes Commission for the purpose of extinguishing the tribal titles, either by cession or allotment, with a

view to the ultimate creation of a state to embrace the lands within the territory. At page 296, n.1, the Court cites the annual reports of the Dawes Commission in its efforts to further the policy of Congress; efforts which the Court describes as beginning in discouragement, but finally crowned with success.

There were twelve reports filed by the Dawes Commission with Congress between the years 1894 and 1905. Although the Commission to the Five Civilized Tribes, as it was officially called, was charged with negotiating the cession of land from the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, its broader mission was to restructure the government of Indian Territory with a view towards creation of a State for the Union. To this end the Commission concentrated its efforts on the Five Civilized Tribes because the smaller Tribes, such as the Potawatomies, were effectively divested of their reservations under the Dawes Severalty Act of 1887, which did not apply to the Five Tribes.

However, the reports of this Commission are important to this case because they give an accurate first-hand account of the conditions existing throughout the Indian Territory which greatly shaped the policies adopted by Congress and form a basis to develop an understanding of Congressional intent in regard to disestablishment of all reservations in Oklahoma and the admission of Oklahoma as a State. These reports are reproduced in the addendum accompanying the State's opening brief filed with the Tenth Circuit Court of Appeals.

Before the work of the Dawes Commission began, the Select Committee on the Five Civilized Tribes reported on the condition of government and the need to abolish reservations in the Indian Territory in SR No. 377, 53rd Cong. 2d Sess., May 7, 1894. See *Woodward*, 238 U.S. at 299, note 2. The Committee found that the Territory had no centralized government, insufficient law enforcement, no public education and a land monopoly that was organized under the reservation system whereby the best land was controlled by a few tribal leaders for their personal profit to the exclusion of all other tribal members.

The Committee called the system not only non-American but radically wrong and called for a change because "the situation grows worse and will continue to grow worse. There can be no modifications of the system. It cannot be reformed. It must be abandoned and a better one substituted." The Committee noted that this would be a difficult task because of the nature of tribal tenure to the land, but the Committee concluded that the Indian Tribes had breached the trust that was plainly provided in the treaties to hold this vast estate in land for the equal benefit of all Indian citizens and stated, "Whatever power Congress possessed over the Indians it still possesses, notwithstanding the several treaties may have stipulated that the Government would not exercise such power and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes."

Each of the Dawes Commission reports to Congress contain insightful commentary on the corruption of tribal governments, the lamentable failure of the reservation system, the difficulties of the Commission in tribal negotiations and the Commission's actions to overcome those difficulties and finally dispose of the reservations which involved one of the largest, most intricate and difficult undertakings in which the Government had ever been engaged to that point, in the estimation of the Commission.

The objectives of the Commission, the allotment of the land and the effacement of the tribal governments, were successfully obtained and the great effort of the Commission, spanning more than a decade, enabled the Federal Government to create a State to be admitted to the Union for the benefit and protection of the Nation itself, as well as the citizens who resided there.

As was its stated intent, the Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional State government capable of admission into the Union on an equal footing with the original States. This culminated in the report filed by the Commission on the Territories recommending Oklahoma statehood in HR Rep. No. 496, January 23, 1906, 59th Cong. 1st Sess. to accompany H.R. 12707,

The Oklahoma Enabling Act, 34 Stat. 167.

The foregoing reports form the authoritative Congressional history of the creation of the State of Oklahoma from the first-hand accounts of Congressmen and government official who where there. It is from this beginning that the State Government assumed the jurisdiction over all citizens of the State with the concurrent plenary power to tax all property unless specifically restrained by federal law.

From the tenor of these legislative reports and the actions of Congress at the turn of the century, it is clear that the federal government was unpleased with the course of social evolution in the Indian Territory and Congress worked in earnest to effect a lasting change in the way these citizens would be governed. This was not a mere surplus land act but a comprehensive program by the Federal Government to politically reconstruct the Territory. The assimilation policy of Congress at this time was so strong that the enactments of Congress were in complete derogation of the treaties made with the several tribes. Congress had concluded that since the tribal governments had violated their duties under the treaties and the federal government made no effort to enforce the agreements on its part, the treaties had to be set aside in order to restore a constitutional government in the Territory. Of course, the more influential tribal leaders who profited from the reservation system mounted opposition to the disestablishment of that system and pointed out that the treaties distinctly provide that the Indian lands would never be included within a state or territory. The fact that these reservations were eventually included within the State of Oklahoma, in spite of the treaties, only underscores more boldly the intent of Congress to dispose of all reservations in Oklahoma.

Of course the Indian tribes questioned Congress' ability to revoke treaty stipulations without their consent. However, this court put that question to rest in *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), where the Court ruled:

> Plenary authority over the tribal relations of the indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

The Court held in that case that Congress had the power to abrogate the provisions of an Indian treaty unilaterally. But even before *Lone Wolf,* the Supreme Court had determined that the treaties with the tribes in Oklahoma must yield to congressional enactments. In the *Cherokee Tobacco,* 11 Wall. 616, 20 L.Ed. 227 (1871) the Court ruled at page 229:

> A treaty may supersede a prior act of Congress *(Foster v. Neilson,* 2 Pet. 314), and an act of Congress may supersede a prior treaty. *Taylor v. Marton,* 2 Curt. 454; *The Clinton Bridge,* 1 Woolw. 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

The preceding argument paints a vivid picture of congressional intent to disestablish all reservations in Oklahoma. This intent and belief has carried forward to the present, and Congress has since

recognized that no reservations survived past Statehood. The Senate report on the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq., S.Rep.No. 1232, 74th Congress 1st Sess.,July 29, 1935, states:

> In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.

Against this background, this Court stated in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943):

> The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. *Worchester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483, held that a state might not regulate the conduct of persons in Indian territory in the theory that the Indian tribes were separate political entities with all the rights of independent status~a condition which has not existed for may years in the Sate of Oklahoma.
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> * * *
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> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worchester v. Georgia*, supra; and, unlike the Indians involved in The Kansas Indians case, supra, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.

The Supreme Court cited Oklahoma Tax Commission with approval in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, (1973) where the Court held that Arizona could not tax the income of an Indian on the Navajo reservation in that State. The Court stated at 411 U.S. 167-168:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not posses the usual accoutrements of tribal self-government. See e.g., *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

And again at 411 U.S. 171 of that opinion:

> As noted above, the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

The view held by Congress that no reservations remain in Oklahoma is also shared by the executive branch. The U.S. Department of Commerce published a handbook outlining various aspects of many of the Indian tribes in the United States entitled *Federal and State Indian Reservations and Indian Trust Areas* (1973). In the Oklahoma section of this handbook the D.O.C. noted:

> The Indian land status in Oklahoma is unique in comparison with Indian lands elsewhere. Because of special laws related to Indian-owned land in Oklahoma, there are no reservations in that State, insofar as the term generally applies to Indian lands in other parts of the United States.

> The members of the 27 tribes mentioned herein have been assimilated to such a degree that any statement made in reference to tribal economy, transportation, climate, community facilities, and recreation would reflect the status of the non-Indian community. Therefore, these headings have been omitted from the Oklahoma portion of this handbook.

Also, the *Map of Indian Lands and Related Facilities as of 1971*, compiled by the Bureau of Indian Affairs in cooperation with the Geological Survey, U.S. Department of Interior, identifies the "former reservations in Oklahoma."

The land in question in this case does not come within the category of an Indian Reservation because this Tribe has not developed a living tribal community apart from the general community of the State. This observation is borne out by the population statistics published by the Department of Commerce, Bureau of the Census in *American Indians, Eskimos and Aluets on Identified Reservations and in the Historic Areas of Oklahoma, (Excluding Urbanized areas) 1980 Census of Population*. On page VIII of the Census a map of Oklahoma notes that the "historic areas of Oklahoma" consist of the former reservations which had legally established boundaries during the period 1900~1907. These reservations were dissolved during the two-to-three year period proceeding the statehood of Oklahoma.

The Census also demonstrates the assimilation of the Indians of this Tribe. Table 13 of the Census shows that the total Indian population in Oklahoma is 113,367, compared with a total population in Oklahoma in 1980 of 3,025,000 *(Statistical Abstract of Oklahoma)*. Table 13 also shows that there are 529 Citizen Band Potawatomi Indians which reside in Cleveland and Pottawatomie Counties (these are contiguous counties and the tribal land is located in Pottawatomie County) and 424 are enrolled tribal members. The entire Indian population of all tribes in Cleveland and Pottawatomie Counties is 4036 compared with a total population in those counties of 133,173 and 55,239 respectively. A rough estimation of the percentage of Indians to the total population statewide is 4% and for Cleveland/Pottawatomie Counties is 2%.

All of these opinions expressed in Supreme Court decisions, Congressional reports, and federal publications, coupled with the surrounding circumstances which prompted Congress to adopt the policy of allotment and assimilation of the several reservations in Indian Territory all point to the conclusion that the tract of land in question here, or any tract of land in Oklahoma, is not a reservation.

This Court has held in *Solem v. Bartlett*, 465 U.S. 463 (1984) that explicit language of cession and unconditional compensation are not prerequisites for a finding that a reservation has been disestablished. The Court also looks to surrounding circumstances, the tenor of legislative reports presented to Congress, and events that happened after the passage of the Act as well as Congress' own treatment of the affected area in the following years to decipher Congress' intentions. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, the Court acknowledges de facto, if not de jure, diminishment, *Solem* at 465 U.S. 471, citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). When the factors set out in these three cases are applied in the context of the case at bar, it is clear that reservations no longer exists in Oklahoma.

To return to the case at bar, the Tenth Circuit opinion would read the law to mean that if an Indian tribe transfers land in trust, it then becomes an Indian reservation, and in effect a zone beyond the jurisdiction of State law, thereby enabling anyone to come onto that piece of land and conduct business free from responsibility to any State law as long as they are touching the land with one foot, as if "Indian Country" had some magical power to extinguish State laws like a legal kryptonite. The State would submit that in regards to the practical administration of any law in Oklahoma, the Tenth Circuit's theory is patently unreasonable.

B. The State has a right and a proper jurisdictional basis to apply tax laws to the Tribal business.

Regardless of whether or not the land held in trust for the Tribe is a reservation, the transactions at the tribal store in this case

are still taxable under the authority of *Moe and Colville*, supra. However, the Tenth Circuit found that those cases did not apply here because the State has not received an independent grant of jurisdiction from the Federal Government.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court rejected the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land. Also, in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. _____, 109 S.C. 1968 (1989), this Court stated that its approach to the question involved in that case of whether a State may tax on-reservation oil production by non-Indian lessees has varied over the course of the past century. At one time, such a tax was held invalid unless expressly authorized by Congress due to the early legal theories of intergovernmental immunity. But more recently, due to the repudiation of that theory, such taxes have been upheld unless expressly or impliedly prohibited by Congress.

In the *Cotton* case, this Court found that non-Indian lessees were not exempt from state oil and gas gross production taxes even though the lessees were subject to the tax burden of both the state and the tribe because the leases were located both within the State of New Mexico and within the borders of the Jicarilla Apache reservation. The case at bar is similar to that situation because the sales transactions occur within the State of Oklahoma and on tribal land, between the Tribe and the non-members who make purchases at the store. It would be consistent with *Cotton* to allow both the tribal and the State tax on the transactions in this case, because the State is responsible for, and does provide, the full slate of State services to tribal members and non-members alike. It is significant in this case that tribal members do not live on the land in question or on a reservation, but have been assimilated into the non-Indian community and therefore enjoy the facilities of State government to the same extent as all other citizens.

The Tenth Circuit found that this assimilation was irrelevant because an Indian tribe exists apart from its individual members and

retains absolute sovereign powers which in and of itself preclude the application of State laws. This type of approach has died a thousand deaths in recent years, most recently in *Cotton*, where this Court ruled that although determining whether federal legislation has preempted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process. As a result, questions of preemption in this area are not resolved by reference to standards of preemption that have developed in other areas of the law and are not controlled by "mechanical or absolute conceptions of state or tribal sovereignty." Instead the Court has applied a flexible preemption analysis sensitive to the particular facts and legislation involved. Each case requires a particularized examination of the relevant state, federal, and tribal interests.

The State sees no federal preemption of its tax laws as they are applied to sales made by this Tribe at its store. Certainly, nothing in the Oklahoma Cigarette Stamp Tax Act, 68 O.S. §301 et seq., or the Oklahoma Sales Tax Code, 68 O.S. §1350 et seq., provides an exemption for Indians or Indian Tribes. Federal law also prohibits the Tribe's activity under the Trafficking in Contraband Cigarettes Act, 18 U.S.C. §2341 *et seq*. Conversely, there is no law which allows an Indian tribe to sell products to others for the purpose of helping those others avoid valid State taxes.

The State also asserts that the Federal policy toward tribal self-determination derived from the Constitution, does not preempt State taxes. The Federal Governments power over Indians is derived from federal responsibility for regulating commerce with Indian tribes, U.S. Const. Art. I, §8 cl.3 and for treaty making, Art. II, §2, cl.2. Only the power to regulate commerce remains since treaty making was abolished in 1871 by 25 U.S.C. §71. However, under the Commerce Clause, Indian tribes are not treated as a separate state or foreign nation. In *Cotton* at 109 S.C. 1716, the Court quoted Chief Justice Marshall's remarks that, "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes ~ foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct."

This Court also concluded in *Cotton* that it is well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.

> Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other. *Cotton*, 109 S.C. 1716.

The State sales taxes involved in this case do not infringe on the Tribes right to govern itself because the tax is validly imposed on the consumers of the items purchased,68 O.S. §302, 1361, and is not a tax on the Tribe in its capacity as a Tribe. these taxes are a nondiscriminatory levy on the citizens of this State for the general revenue of the State Government and therefore do not purport to regulate or affect internal tribal affairs or self-government.

When an Indian tribe decides to operate a business in Oklahoma, the tribe does not have any right to help others evade State taxes. This point was addressed *Moe* where this Court found that to require the tribal seller to collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that non-Indians purchasing from a tribal seller will avoid payment of a concededly lawful tax.

The Tribe simply does not have any governmental interest, traditions, or rights to operate businesses in complete disregard of State law and generate business by offering non-members an exemption from State laws that they are properly subject to. The State

recognizes that the Tribe has an interest in tribal economic development. However, the State has an interest in collecting taxes from its citizens to fund the government. These interests are not mutually exclusive because requiring the Tribe to comply with State tax laws will fulfill the interests of the State and will not prevent the Tribe from sustaining its economic development, just as it does not prevent all other businesses from realizing a profit. Of course, if the Tribe did pay its taxes it would be required to work more vigorously to compete on a level playing field with all other businesses and there would be no guarantees of success. However, *Moe* and *Colville* make it clear that a Tribe has no vested right to a certain volume of sales to non-members, or indeed to any such sales at all. If the tribal store is a failure because of the increased cost of state taxation, then the store should be allowed to fail so that the Tribe can invest its money and energy into something else that is more profitable.

Application of State tax laws to the Tribe's business are not barred by sovereign immunity because the sovereign immunity doctrine has undergone considerable evolution in response to changed circumstances. In the case at bar, the Tribe's activity and interaction in the business community today is wholly different than the role of the tribal government in the early years of the Republic when *Worchester v. Georgia*, 6 Pet. 515 (1832), was decided, as this Court stated in *McClanahan*, Supra. Accordingly, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community, *Oklahoma Tax Commission v. United States*. Notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians.

The Tenth Circuit, however, found that the law enunciated in *Moe* and *Colville* cannot be applied in Oklahoma because Oklahoma disclaimed jurisdiction over Indian land upon entering the Union and did not assert jurisdiction under Public Law 280. This part of the Tenth Circuit ruling need not detain the Court because the Appeals Court is clearly wrong in its analysis. As has been stated in the Petition for Certiorari at pages 9-11, the Oklahoma Constitution disclaims all right and title to all lands within the State held by any Indian, Tribe, or nation.

This disclaimer language was construed by this Court in *Organized Village of Kake v. Egan*, 369 U.S. 601 (1962) at 69:

> The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest.

The disclaimer language in the Oklahoma Constitution was also construed as a disclaimer of proprietary rather than governmental interests by the Oklahoma Supreme Court in *State ex rel. May v. Seneca - Cayuga Tribe*, 711 P.2d 77, 87 (Okl. 1985). The disclaimer was made because the Federal Government had placed restrictions on alienation and tax exemptions on the allotments that had been granted before Statehood. In order to insure that Statehood would not effect the allotments that had been made, the disclaimer was placed in the Constitution of the new State. The disclaimer was not made to provide a vehicle for people to evade State laws. The decision in *Kake* indicates that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Therefore, the disclaimer is not an obstacle to enforcement of State taxes in the case at bar because it only concerns property rights in land, which is not at issue in this case.

Also, the Tenth Circuit ruling that Colville does not apply because Oklahoma has not asserted jurisdiction under P.L. 280 is clearly erroneous. The P.L. 280 law has no application to the State of Oklahoma and the Tenth Circuit's strained construction of that statute as a bar to State jurisdiction is solely based on implications drawn from what the statute *does not say*.

The Appeals Court reasons that since Oklahoma was not mentioned in the statute and since the State did not seek to assert jurisdiction under the statute, then no jurisdiction exists in which an application of *Colville* could be made. It never occurred to the Appeals Court that, first, Oklahoma had all necessary jurisdiction before P.L. 280 was enacted in 1953, see *Oklahoma Tax Commission v. United States*, supra (1943), and second, this Court never relied on P.L. 280 for its conclusion in *Colville* that the taxes imposed on sales

to non-members are valid. See also, *Cotton Petroleum*, supra, where state tax laws extended to on-reservation activity of non-members in the non-P.L. 280 state of New Mexico. The conclusion that P.L. 280 has no relevance to this case was also drawn in the Amicus Curiae brief of the United States, filed herein, at pages 16 and 17. The point is that this Court found that the tribal sellers in *Colville* were ordered to collect the State taxes on sales to nonmembers because State taxation of nonmembers on the reservation did not infringe on the Tribe's right to govern itself and was not preempted by Federal law.

Besides the unimpeachable authority in *Moe* and *Colville*, the conclusion that the transactions at the tribal store are subject to State taxes, is also the most reasonable approach. The citizens of this State who use the States facilities have no right to evade or avoid taxes that support those facilities. Even if the Indians have any right at all to be free of State taxes under some uncodified "federal policies" alluding to the Constitution, that is absolutely no excuse for anyone else. However, the mechanism employed for collecting cigarette and sales taxes is that the vendor, the Tribe in this case, must affix the cigarette stamps and collect the sales taxes which are paid by the customer, and then remit those taxes to the State. This system breaks down when the Tribe refuses to comply with these collection procedures, thereby enabling those who are properly taxable to escape the tax on a theory of Indian sovereignty that is not available to them as non-members.

II. TRIBAL SOVEREIGNTY CANNOT BE MAINTAINED AS A DEFENSE TO THE STATE'S LAWSUIT TO ENFORCE ITS RIGHT TO COLLECT TAXES.

The State's brief up to this point has shown that State and Federal statutes require the Tribe to collect cigarette and sales taxes on sales transactions at the Tribal store. The State has also shown that no reservations exist in Oklahoma, but that regardless of that fact, the State taxes at issue in this case are applicable to sales made by the Tribe to non-members pursuant to the *Mescalero*, *Moe*, and *Colville* decisions of this Court which hold that the State has a right to have its valid taxes collected.

However, these statutes and cases are not self-enforcing. The Tribe was certainly aware of all of these laws when it opened its store and the Tribe knew that it had an obligation to obey those laws and collect the taxes. The Tribe elected not to obey those laws because it could make more money by selling its merchandise unburdened by State taxes, in effect marketing an exemption to taxpayers who had no exemption. The State attempted to enforce these tax laws by assessing the Tribe for $2.7 million of delinquent taxes and filed a counterclaim in this lawsuit to enjoin the Tribe's illegal operation. These efforts have been fruitless up till now.

It does not concern the Tribe that its activity is illegal and an infringement of the State's affirmative right to have its taxes collected because the Tribe asserts a theory that it is possessed of absolute and unqualified sovereign immunity to any lawsuit or enforcement action of the State. And even though the State legislature and Congress and the United States Supreme Court has stated that the Tribe must collect these taxes, the reality is that if the Tribe refuses to comply, there is just simply nothing the State can do about it because of tribal sovereign immunity; according to the opinion of the Tenth Circuit Court of Appeals.

The vexing problem before the Court today is how to reconcile the State's enforcement of tax laws with Tribal sovereignty. And if these competing interests are irreconcilable, as the case at bar suggests, whose interests should yield. The *Mescalero, Moe* and *Colville* cases stand as testament to the State's right to collect taxes, but the Court never addressed the issue of enforcement of that right other than to mention in *Colville* that Washington's seizure of cigarettes in transit may be proper if the seizures occur off of the reservation. The Tenth Circuit, however, has enjoined the State from any enforcement in this case, including seizure of cigarettes.

The Tenth Circuit found that Indian tribes have sovereign immunity from suits to which they do not consent pursuant to this Courts decisions in *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977). The language in these cases is compelling to be sure. The *U.S.F.& G.* case states at 309 U.S. 512, "These

Indian Nations are exempt from suit without Congressional authorization." *Puyallup* reads at 433 U.S. 172, "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian Tribe."

The Court is fairly presented with a choice in the present case. If the Court takes the course which allows the State to sue the Tribe in order to collect taxes, the holding in *U.S.F.& G.* must be abandoned and the Tribe will be exposed to millions of dollars of delinquent tax liability. If the Court chooses the second path, and embraces the Indian sovereignty doctrine, the States rights under *Colville* will be totally unenforceable and this Court should reject those rights altogether because the Tribes will certainly ignore those rights safe in the knowledge that they cannot be sued. In all practicality, cigarette seizures in transit can never effectively enforce the law since movement of cigarettes across state lines cannot be traced. The State of Washington, in fact, has not been able to enforce its cigarette tax laws under this method.

In this regard, the most reasonable approach is to allow the State and the Tribe to settle their differences in a court of law rather than leave the adversaries with a pursuit of street justice in the form of self-help methods *vi et armis*. This Court must consider the fact that there are more than 400 tribal governments recognized by the United States located within the 50 States and countless local governments and subdivisions such that it is inevitable that conflicts will arise. By Article III, the Constitution anticipates that these conflicts should be resolved by the Judicial Department of the Government rather than surrender the various agencies to their own devices.

The State naturally suggests that the correct approach is to strike down the Tribe's immunity defense because it is most reasonable, given the two choices, to allow the State to collect its taxes with the ability to enforce those laws in Court. The State not only has a right to collect its taxes, but a duty as well, in order to fund and maintain the services of an ordered society. The State's interests in raising revenue for the support of the government was recognized in *Colville* as the reason behind the State's rights. However, a right implies a remedy since a right without a remedy is no right at all. The

enforcement of tax law by suit is so closely interwoven with the substantive right of the State to tax its citizens as to make the separation of the two wholly improper. To deny the remedy is to deny the right.

The State recognizes the Tribe's right to govern itself but does not recognize the Tribe's "right" to rearrange state laws by reason of its "sovereignty." In fact, Indian sovereignty is a misnomer because how can one who is subject to complete defeasance, according to *Rice v. Rehner*, 463 U.S. 713 (1983), claim to possess any sovereignty. The most that can be said is that tribal sovereignty is limited, if we can use the term "sovereignty" at all. This Court described it in *McClanahan*, supra, at 411 U.S. 173 as follows:

> The relations of the Indian tribes living within the boarders of the United States is an anomalous one and of complex character. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.

As long as the Tribes are acting "as a separate people" in regulating their internal and social relations, there is no conflict with State laws. The State will never presume to legislate with regard to who can be a tribal member, election of tribal officials or the form of tribal government and laws. It is undisputed that such things are left solely in the hands of the Tribe. The problem comes when the Indians are not a separate people but are assimilated into the General Community where they live, work and trade. When the Tribe reaches out to interact with non-members and invites the community into its business place, then the Tribe is not dealing with its internal affairs, and conflicts arise with State laws that do govern the lives and businesses of the community within which the Tribe has immersed

itself. When the Tribe reaches outside of its internal affairs, the Tribe steps into the reach of State law because the Tribe's limited sovereignty does not extend so far.

The Court should consider the reason why the Tribe is using the sovereignty defense in this case and compare that with the circumstances and reasoning of the doctrine in *U.S.F. & G.* and *Puyallup*. The *U.S.F. & G.* case was decided in the context of a wardship wherein the United States was bringing suit as trustee of the mineral resources of the Tribe. Since the Tribe was under tutelage to the United States, the cross-claim against the Tribe was dismissed. But *U.S.F. & G.* was decided on the grounds of the sovereignty of the United States in its capacity as a trustee and does not consider the Tribe's sovereignty in its own right. In *Puyallup*, the Court found that the State Court had no jurisdiction to regulate the Tribe's treaty protected fishing rights. Specifically, the Tribe was resisting the State Court's authority to require the Tribe to provide information to the State concerning the limitation of the number of fish the Tribe was allowed to catch. The Court recognized the practical problem of enforcement but found at 433 U.S. 178, that the Tribe could properly resist the States authority due to tribal sovereignty, however, this Court advised the Tribe that it may be in the Tribe's best interest to "voluntarily" provide such information. At this point, it is interesting to note Justice Blackmun's concurring opinion in Puyallup in which he stated:

> I join the Court's opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). I am of the view that that doctrine may well merit re-examination in an appropriate case.

The doubts arise in the case at bar because this case does not deal with the Federal Governments protection of a ward or with a tribe's protection of its treaty made fishing rights. Here, the Tribe is using the sovereignty doctrine as a barrier to valid law enforcement to enable the Tribe to illegally operate a business with the singular

ambition of fulfilling its lust for lucre. The Tribe certainly has no right to sell tax free goods to the people of Oklahoma, but the Tribe resists these laws only because it has the power to do so by way of the Indian sovereignty doctrine.

In this case the Tribe has displayed a reluctance to properly limit itself and an arrogance toward reason, borne principally out of the blind application of the sovereignty doctrine by the Tenth Circuit to any situation. This is the short-coming of the *Colville* case; State laws are made applicable to the Tribe but the Tribe is unanswerable in Court for violation of those laws.

The circumstances of today have changed enough to warrant an examination of the sovereignty doctrine. As we meet these new circumstances we can realize, as it has been realized with other doctrines which have been abandoned, that what appeared to be good yesterday, may be superceded by something better today. Our government was designed to respond to change rather than be swallowed up by it.

Nowadays, the Tribe must be responsible to State laws or else the State government will be mired in impotency for no reason at all. Alexander Hamilton stated that, "Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience . . . Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraints." If the Tribe expects to continue to integrate its business into the general business community of the State and remain unburdened by any law, the Tribe expects what never was and never will be. The *U.S.F. & G.* and *Puyallup* cases did not lead to that result.

James Madison stated in the debates at the Virginia Convention, 1788, "What is the meaning of government? An institution to make people do their duty. A government leaving it to a man to do his duty, or not, as he pleases, would be a new species of government, or rather no government at all. That the laws of every country ought to be executed, cannot be denied. That force must be used if

necessary cannot be denied. Can any government be established, that will answer any purpose whatever, unless force be provided for executing its laws?"

Although the Commerce Clause is a grant of plenary power to Congress to regulate the States and Indian Tribes, and this power is the seat of national policies concerning Indian Tribes, none of those policies reach so far as to empower a Tribe to extend its limited sovereignty over the State of Oklahoma to countermand State laws as in this case. This seems more incredible in light of the fact that a State is an indestructible component of the federal system and the Tribe is merely a defeasible vestige of history. The Tenth Amendment to the Constitution prohibits Congress from exercising its plenary power to impair a States sovereignty but Congressional power over Indian Tribes has no limit. No immunity from legislative invasion can be claimed for Indian tribes and the consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. *The Cherokee Tobacco*, 11 Wall. 616 (1871). Rather than Tenth Amendment protections, Indian Tribes are merely protected by federal policy derived from the Constitution which has vascilated from autonomy to assimilation and from termination to self-determination. But whatever the federal policy has in store for Indian tribes now and in the future, this policy is purely a function of the Federal Government, and the power to implement any federal policy is limited to the extent that policy might operate to excessively infringe on the states rights in violation of the Tenth Amendment. Therefore, the policy of tribal self-government may not be used by the Tribe to sell tax exemptions to the taxpayers of Oklahoma.

It is conceded that State tax enforcement against Indian Tribes would cause theTribe to operate their business differently or choose not to go into business at all. Indeed, in this case the effect on the Tribe will include a substantial tax liability for all the years of unpaid taxes. But the tax laws in question do not regulate tribal government or affairs or attempt to tax the Tribe as a Tribe. The only reason a Tribe would ever owe sales and cigarette taxes is if the Tribe breached its duty to properly collect and remit the taxes from its customer. The Tribe in this case is trying to revive the repudiated

doctrine of intergovernmental tax immunity by asserting tribal sovereignty. The State may not tax the Tribe, but the Tribe may not claim tax exemptions for customers merely because they made their purchases at a store owned by the Tribe. Any exemption owing to the Tribe itself does not extend so far.

If the Tribe is unanswerable to State laws because of its immunity derived from federal policy, then the Tribe will expand its operations into every area in which the State heavily taxes or regulates in order to undermine the States authority. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing limits assigned to it, Madison Federalist No. 48. It is also undeniable that the framers of the Constitution included the Tenth Amendment in order to protect the States rights to exercise its powers of government within our system of federalism and to tax its citizens in order to fund that government. When the framers of the Constitution considered this form of federalism Madison described the importance of the States to the National government in The Federalist No. 45 entitled "Constitution not Dangerous to the States":

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and property of the State.

The Tenth Amendment has however, weathered some construction by this Court in recent years when *Garcia v. San Antonio Metro*, 469 U.S. 528 (1985) overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). But even *Garcia* recognized that the States occupy a special position in our constitutional system and that

the scope of Congress' authority under the Commerce Clause must reflect that position. Justice Powell's dissent in *Garcia* correctly perceives that the founders of our Country intended more than that. Justice Powell wrote at 469 U.S. 571:

> The framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. The States would serve this essential role because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to State government. For example, Hamilton argued that the States "regulate all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . "The Federalist No. 17, p. 107 (J. Cook ed. 1961). Thus he maintained that the people would perceive the States as "the immediate and visible guardian of life and property," a fact which "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government. Madison took the same position, explaining that "the people will be more familiarly and minutely conversant" with the business of state governments, and "with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship; and of family and party attachments . . ." The Federalist No. 46, p. 316 (J. Cook ed. 1961). Like Hamilton, Madison saw the State's involvement in the everyday concerns of the people as the source of their citizens loyalty.

The Tenth Amendment was intended to fully guarantee the States' rights for separate and independent existence and place a limit on the Federal Government's power to interfere with or impair the States' integrity or its ability to function in a federal system for the protection of the Nation.

In many articles of the Constitution, the necessary existence of the States, and, within their proper spheres, the independent authority of the States is distinctly recognized, Usery citing *Lane County v. Oregon*, 7 Wall. 71 (1869). In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926) the Court likewise observed that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." The Court in Usery added that "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

The State does not contend that *Garcia* is wrong because within the context of that case, it is certainly reasonable that State employees should be paid a least minimum wage and enjoy the protections that all other employees enjoy. However, the Court should not allow the Tribe to frustrate the States ability to collect the revenues necessary to pay those wages under a federal policy of tribal self-government which does not apply to the circumstances of the Tribe in this case. The State's ability to levy taxes on its citizens for the support of the government can be nothing but a function essential to separate and independent existence.

The Tenth Circuit's opinion enjoining the State from collecting its taxes is violative of the Tenth Amendment to the United States Constitution as a direct burden on the States administration of its tax laws. There is no reason why the government of the State should be prevented from taxing its own citizens upon transactions occurring within this State, at the tribal store. It could not be maintained that the Federal Government could prevent the State from collecting its taxes and the presumption that the Tribe could do so is totally unfounded. See *Coyle v. Smith*, 221 U.S. 559 (1911), each state is competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.

In the case at bar, the Tribe should not be allowed to raise an immunity defense to these taxes which are undoubtedly applicable to its transactions. At one time intergovernmental tax immunity was

once much in vogue in a variety of contexts stemming from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), and his conclusion that the power to tax is the power to destroy. This position has changed in recent years and a long litany of cases that need not be recited here, have thoroughly repudiated the doctrine. One reason that the intergovernmental immunity doctrine failed is that taxes are indispensable to the maintenance of a government and within our federal system, the tax base of the various governments could be undermined by the doctrine. Also, the doctrine was used by persons who were properly taxable to evade those taxes. Besides tax evasion, another practical problem facing the State rests in the inherent psychology of taxation in that, when an exemption from tax is granted, the taxpayers then try to bring themselves within the exemption by disguise in form or a substantive change in their business. For example, if the government of a country decides to impose a tax upon all horses except white horses, the country will be instantly filled with nothing but white horses. By analogy in Oklahoma, the State is witnessing businesses who tie themselves to the government of a tribe with licenses, quit claim deeds, consignment agreements, etc... and produce substantial amounts of untaxed sales in this State under the erstwhile Indian exemption.

Such a case was before the Court in *New York v. United States*, 326 U.S. 572 (1946), in which New York purchased the Saratoga Springs in order to conserve the natural resources of the springs. The State bottled the spring water, commercially marketed it and claimed intergovernmental immunity from the federal soft drink tax. Up until that time, the States had been immune to federal taxes because of the supposed implications of our federal system. But seeing that this immunity was undermining the tax base of the soft drink tax laws, the Federal Government challenged the immunity which was struck down by this Court. The intergovernmental immunity doctrine was abandoned that day because it had outlived its usefulness when the Court recognized the vast extension of the sphere of government, both State and national compared to that with which the Fathers were familiar. Even though the doctrine had been a fixture in American jurisprudence since the birth of the nation, the Court found that the doctrine no longer fit the needs of modern government. "To press a juristic principle designed for the practical

affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense" 326 U.S. at 577.

In deciding that case, the Court held Congress may not lay taxes, for instance, upon a Statehouse or a State's tax revenues because these could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taxes a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. Congress may exempt states while taxing private enterprises, however:

> If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy."

Likewise, the Potawatomis may carry out its own notion of social policy in engaging in the cigarette business, but it must pay its share in having a nation, a state and a federal system which enables the Tribe to pursue its policy. State taxation of the tribal business does not infringe the Tribe's right to self-government. The State's taxes will not regulate or control tribal meetings or cultural events or affect the course of tribal government by taxing the Tribe as a Tribe. The Tribe in this case is asserting the inter-governmental immunity doctrine under the name of Indian sovereignty. This doctrine has been rejected because it is not practical in today's world as the Tribes are extending the scope of their activities ever deeper into the affairs of the State's community, see *Mescalero Apache Tribe v. Jones*, supra.

In point of fact, the Tribe can point to treaty provisions which describe greater immunities than the Tribe enjoys today, but those

laws did not remain static throughout the course of history. The relationship of the new nation and the Indian tribes 200 years ago bears little resemblance to the relationship that exists today, in view of the many different businesses that Tribes are engaging in. Further, the statesmanship practiced by the Dawes Commission dismantled those immunities in order to put the last piece of the continental United States in place. Whether or not these decisions were unfair does not negate the fact that laws respecting the tribes in Oklahoma were changed. That laws will change is an essential nature of government. "The science of government is the most abstruse of all sciences, if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment", *New York v. United States*, citing *Anderson v. Dunn*, 6 Wheat. 204, 226.

There is no reason why a tribally owned business should not pay taxes just as all other business do. Such a result would not prevent the Tribe from operating a business nor affect the way in which the Tribe governs itself. The Tribe should not be allowed to resurrect the intergovernmental immunity doctrine via the sovereign immunity defense. The circumstances of yesteryears tribal sovereignty have changed from those days of wardship to the circumstances of today where the Tribe is increasing the scope of its activities beyond its own membership. For these reasons, the defense of tribal sovereign immunity to the State's lawsuit to enforce taxes should be overruled.

CONCLUSION

The Oklahoma Tax Commission respectfully requests that this Court reverse the opinion of the Tenth Circuit Court of Appeals which dismissed the State's counterclaim against the Tribe and enjoined the State from enforcing tax laws against the tribal business. Under the controlling authority of *Washington v. Confederated Tribes of Colville*, supra, the sales at the tribal store are taxable. Further, the tribal sovereign immunity defense to the States lawsuit should be struck down as unreasonable in light of the Tribes activities that include and affect non-members, *Mescalero Apache Tribe v. Jones*.

Respectfully submitted,

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